No. 12513

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

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Seattle 4, Wash.

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Attorneys for Appellees.

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STATEMENT OF THE CASE

The plaintiffs' complaint alleges that on January 21, 1948, Sgt. William Anderson, an agent of the Criminal Investigation Division of the United States Army, interviewed the plaintiff, Mrs. Hambleton, at her home while Mr. Hambleton was absent from the city; that

Sgt. Anderson was making an investigation in the course of his official duties; that he made statements and unreasonably and intentionally subjected Mrs. Hambleton to severe emotional distress in that he "grilled" her for a period of about three and one-half hours on matters about which she had no knowledge and stated to her that her husband was consorting with a redheaded woman, that he was under arrest on charges of grand larceny and drunk driving, and talked to her about getting a divorce from her husband. The complaint further alleges that the statements made were of such nature and the continuous grilling carried on was of such a nature that William Anderson knew or should have known that the resulting emotional and mental distress were likely to result in illness and bodily harm to plaintiff, Harriet Elizabeth Hambleton, particularly in view of the fact that she was at that time convalescing from a major operation, her resistance to any emotional stress was low, and Anderson was informed of these facts and warned not to upset her; that as a result of this interview Mrs. Hambleton suffered a complete mental collapse and went insane for a period of over a month, requiring hospitalization and shock treatments to restore her sanity (T.R. 5 to 8).

The defendant moved to dismiss the complaint for the reasons (1) that the alleged tort falls within the exceptions of the Federal Tort Claims Act; and (2)

that the complaint fails to state a cause of action against the United States of America. This motion was overruled.

The following is a summary of the evidence adduced at the trial. Sometime prior to January, 1948, the Criminal Investigation Division of the United States Army received reports that a certain Lt. Bennett stationed at Fort Lawton, Seattle, Washington, was demanding a "kick back" of a portion of the rewards granted by the Army to private detectives and other individuals who apprehended and returned soldiers who had deserted the Army. Sgt. William Anderson, an agent of the Criminal Investigation Division, was assigned the task of investigating the facts of the alleged misconduct of Lt. Bennett.

Anderson learned that a private detective, Mr. O. E. Hambleton, had returned several deserters to the Army authorities at Fort Lawton. Anderson decided to interview Mr. Hambleton to determine if any demands had been made upon him for "kick backs" on the rewards which he had received. It was orally stipulated at the trial that there was no suggestion of misconduct on the part of Mr. Hambleton.

Upon learning that Mr. Hambleton was in Nevada, Anderson called Mrs. Hambleton on the telephone and after identifying himself, asked for an appointment

which Mrs. Hambleton granted. The evidence is in sharp dispute as to when Anderson arrived at Mrs. Hambleton's home and when he left. The plaintiffs' evidence is that he arrived about 4:00 p.m. and left at about 8:00 p.m. on January 21, 1948, while the defendant's evidence is that he arrived about 5:45 p.m. and left about one and one-half hours later.

After Anderson arrived and showed Mrs. Hambleton his credentials, he first stated that he had some information which would be of some value to Mrs. Hambleton in obtaining a divorce from Mr. Hambleton, and that Mrs. Hambleton had some information which would be of value to Anderson. Anderson stated that Mr. Hambleton was being held on a grand larceny charge in Nevada. Mrs. Hambleton stated that she was not interested in getting a divorce from Mr. Hambleton.

Mrs. Hambleton had had an operation for ulcers on November 14, 1948 and was still receiving medication. She testified that she so told Mr. Anderson and he claimed to be already aware of the fact (T.R. 46, 63, 65). Anderson testified he was advised by Mrs. Raskin, Mrs. Hambleton's mother, during the interview that Mrs. Hambleton had had an operation (T.R. 94). Not denied is Mrs. Hambleton's testimony that she became ill during Anderson's interrogation of her and took some medicine in his presence at the time (T.R. 45, 46,

63, 64). Anderson continued to question Mrs. Hambleton after he knew of her operation, and after the medication in his presence.

Anderson then started questioning Mrs. Hambleton as to whether she knew Lt. Bennett to which Mrs. Hambleton replied in the negative. Anderson kept insisting that Mrs. Hambleton must know Lt. Bennett and asked her the same questions over and over again. After some time Mrs. Hambleton recognized Lt. Bennett as being the same man she had known by the name of Crowthers (T.R. 56, 57).

Mrs. Hambleton complained that all during the interview, Anderson "grilled" her. Her testimony as to what actually happened and what she meant by "grilling" may be summarized as follows:

1. That Anderson was insulting in that he kept asking her the same questions over and over again, insinuating that she was not telling the truth (T.R. 44, 46, 47, 50, 51).

2. That Anderson was there so long, about four hours, and covered so few subjects (T.R. 44, 47, 54, 56).

3. That Anderson asked Mrs. Hambleton excessively repetitive questions concerning personal subjects connected with her marital affairs and not related to the person whom Anderson was investigating (T.R.

43, 44, 46). Anderson also purported to make statements of fact concerning some of these matters (T.R. 43, 44, 48, 49, 55). Some of his statements were fact, others false.

4. That Anderson insulted Mrs. Hambleton by insinuating that her ulcers were caused by excessive drinking which was not true (T.R. 46, 51).

As stated in appellant's brief on page 6, Anderson made no threats that he was going to arrest Mrs. Hambleton. However, in response to cross-examination, when asked the question whether Anderson did anything that would lead her to believe he would use force or had the means of using force to obtain any information from her, Mrs. Hambleton replied, "Well, I can answer that yes, for the simple reason he knew so much about our business that I was afraid he would bring pressure through what he knew of our files, because they were in strict confidence and when I figured that he knew what was in those files that were supposed to be confidential, I figured that he could use those over us for information. I figured that a Government man could do that if it became necessary to get information from someone" (T.R. 55).

On cross-examination, Mrs. Hambleton testified that after she returned from the sanitarium everything came back a little at a time. It is clear from her testi-

mony that her memory was clearly restored relative to the subject matter of her testimony (T.R. 59, 60, 61).

Appellant's brief states there was no testimony whatever that anyone asked Mr. Anderson to leave the premises. However, Mrs. Raskin told Anderson that her daughter was upset and had answered enough questions (T.R. 58, 84).

As mentioned in appellant's brief, during the cross-examination of Mrs. Hambleton, she stated that during the interview she received a telephone call from a former woman client of Mr. Hambleton who told her that she had told Anderson about Mrs. Hambleton's operation. When Mrs. Hambleton was asked to reveal the name of the former client, she was reluctant to do so. The trial judge ruled that the United States Attorney had invited hearsay, could object to it but could not use hearsay to build up an opportunity of having a name disclosed (T.R. 53, 54).

Mrs. Hambleton's interrogation by Mr. Anderson was on January 21, 1948. Immediately prior to that she was a patient of Dr. Francis E. Flaherty, convalescing from an operation necessitating the removal of three-fourths of her stomach but not manifesting any abnormal or psychotic tendencies whatsoever to her doctor's observation (T.R. 27).

On January 23, 1948 Mrs. Hambleton appeared at

the home of Lt. Clarence J. Williams. She talked in tangents and was generally incoherent. She refused a bottle of Coca-Cola, fearing it was poison (T.R. 82).

On January 25, 1948, Edwin A. Golder, a Seattle police officer and friend of the Hambletons, saw her. She appeared to be upset and he knew immediately that something was wrong. She was definitely not herself (T.R. 82, 83).

On January 28, 1948, she revisited Dr. Flaherty, who believed she was then definitely suffering from a mentally disturbed condition. He determined she had been going almost without food or water; had a fear of eating; thought she had been drugged; and refused a "sort of Vitamin B" prescribed by the doctor to make up a deficiency because of lack of proper nourishment (T.R. 29, 30, 37, 38). On January 28, 1948, he made arrangements for her to see Dr. John B. Riley, a neuropsychiatry specialist (T.R. 30).

Dr. Riley first saw Mrs. Hambleton on January 31, 1948. He immediately placed her in Crown Hill Sanitarium for approximately one month to restore her sanity. There she was administered a combination of ten electroshocks and insulin treatments. He testified at length concerning her insanity but stated that after her treatments and release from Crown Hill Hospital her memory had improved and she was outwardly essen-

tially normal (T.R. 66, 67).

Dr. Riley was asked:

> Q. Could a protracted period of persistent questioning with grilling constantly recurring on a point which a person had denied, to have it constantly thrown back to them over a period of time, could that, coupled with knowledge that it was Government official who was carrying on that grilling, cause such an emotional disturbance as might cause an injury such as she sustained?
>
> A. It could have, yes (T.R. 68).

Dr. Riley further testified, as stated in his letter which is Exhibit A-1, in his opinion, threats, worries and interrogation are what caused Mrs. Hambleton to become insane (T.R. 71).

He said that the injury she suffered was more than mental illness. It was a definite psychosis; that grilling on top of a major operation would make her more prone to develop trouble, than if she hadn't had the operation (T.R. 69, 81).

The trial judge in his oral decision and written Findings of Fact found that the defendant's agent, Anderson, interrogated Mrs. Hambleton for approximately three and one-half hours and in so doing failed to use reasonably prudent methods and due care in conducting such investigation and that he grilled her excessively for an excessive length of time and on deli-

cately personal subjects not directly connected with the investigation he was conducting and generally used emotionally distressing methods which were likely to injure her body or mind or endanger her health (T.R. 15). The trial judge awarded the plaintiff $5,000.00 general damages and $552.52 special damages.

In the portions of the brief to follow, Mrs. Harriet Elizabeth Hambleton will frequently be referred to as appellee.

ARGUMENT

I. The tort here committed is one for which recovery is allowed under the laws of the State of Washington.

In Specifications of Error, Numbers 1 and 2, appellant contends that the law of the State of Washington does not allow recovery for the injury here suffered. Appellant claims that, "the plaintiff seeks recovery for mental distress unaccompanied by any invasion of her person or property" (App. Br., p. 13); and further that if any injury was caused it was "caused by words alone unaccompanied by any invasion of the plaintiff's person or property" (App. Br., p. 14).

Appellant is doubly in error in its position; and herein lies the basis for distinguishing the cases cited by appellant. Appellee's action was not to seek recovery for mere mental distress, but for physical and mental

injuries in the form of actual serious, bodily illness, to-wit, a complete mental collapse and insanity requiring hospitalization and medical treatment for approximately one month, and shock treatments with all the pain and suffering incident thereto. Furthermore, those injuries were not caused by words alone as appellant states, with no invasion of her person or property. They were caused by extended interrogation and excessive grilling and emotionally distressing methods which were unreasonable, imprudent and likely to cause injury.

The cases cited by appellant relate to mental suffering and mental distress. Those cases are not in point where the injury is insanity, a bodily illness of a very real sort. The reasoning of those cases wherein the court is reluctant to allow recovery under certain circumstances for mental distress is that the injury is "more sentimental than substantial" and the "difficulty of estimating a pecuniary compensation for mental anguish." See *Corcoran vs. Postal Telegraph-Cable Co.*, 80 Wash. 570. Furthermore, mental anguish is subjective and not subject to positive proof. Such reasons do not stand in the way of allowing just compensation for the very real injury of being driven insane.

Appellant's entire argument rests on a failure to distinguish insanity from mental anguish. This is an apt example of the tyranny of labels. Merely by includ-

ing both insanity and mere mental distress under the label of mental suffering or mental distress, appellant seeks to apply cases on mental anguish or distress in a situation involving physical well-being, to-wit, insanity.

No case has been cited by appellant and none could be found by appellees where the Supreme Court of the State of Washington has held that insanity is an injury for which no recovery can or should be allowed. This is in fact a case of first impression under the laws of the State of Washington. Logically, however, there is a very real distinction between mental distress, which involves mere peace of mind, and insanity, which concerns one's physical well-being and is as real an injury as any other illness. And general law on the subject permits recovery in just such a case as this.

Here the trial court found that Anderson unreasonably subjected appellee to emotional distress. The facts of this case bring it directly within the applicable general rule set forth in the Restatement of Torts.

Restatement of Torts, Negligence, Vol. II, ch. 12, Sec. 312, p. 847.

> "Sec. 312. If the actor intentionally or unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for all illness or other bodily harm of which the distress is a legal cause,

(a) Although the actor has no intention of inflicting such harm, and

(b) Irrespective of whether the act is directed against the other or a third person."

Emden v. Vitz, 88 Cal. App. (2d) 313, 198 P. (2d) 696, allowed recovery in a case very similar on its facts. Plaintiff was a tenant in defendants' apartment house. Defendant "yelled and screamed at plaintiff, saying the O.P.A. could not run the property" while another defendant "shook some papers at her, saying: 'You haven't got an apartment here, we will select our own tenants!' " As a result, plaintiff suffered emotional distress which caused her "to suffer an upset to her glandular condition, causing shortness of breath, pains about the heart, nervousness, headaches, loss of sleep, and inability to carry on her normal activities." Medical testimony showed that she suffered a "very serious" condition caused by "some sort of upset or emotional experience."

That court recognized that the law has been reluctant to protect "one's peace of mind or emotional tranquility as such," but stated that the interest involved in the case and universally protected was "the interest in physical well-being." In thus recognizing the distinction between mental distress and physical injury to the mind or nervous system, the court stated:

> "if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind."

That court stated further:

> "The evidence justified a conclusion that defendants intentionally and unreasonably subjected plaintiff to severe mental distress involving a risk of causing physical harm; and by clear and uncontradicted evidence, it was proven that substantial physical injuries were actually incurred by plaintiff as a proximate result of fright engendered by the said conduct of defendants. Liability under these circumstances is manifestly correct."

Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299, did not involve insanity but it did involve a recognizable effect on plaintiff's health resulting from emotional distress caused by defendant. Where there is such injury to bodily well-being, the Supreme Court of Washington allows recovery for emotional or mental distress caused by a defendant. The case involved a dispute over a funeral bill; the defendant undertaker threatened to hold the body of her son, just died, until the old bill was paid. Plaintiff thought her son had already been cremated and was just recovering from the grief. The court said:

> "Upon receiving this information, her condition became so aggravated that she became sick and lost some ten or fifteen pounds in weight, and the shock materially affected her health."

The Court held this was a willful wrong and recovery should be allowed for mental suffering unaccom-

panied by physical violence. The court quoted 8 Ruling Case Law 531:

> "In cases of willful and wanton wrongs and those committed with malice and an intention to cause mental distress, damages are, as a general rule, recoverable for mental suffering even without bodily injury, and though no pecuniary damage is alleged or proved. And in general, damages for mental anguish or suffering are recoverable where the act complained of was done with such gross carelessness or recklessness as to show an utter indifference to the consequences where they must have been in the actor's mind."

Clark v. Associated Retail Credit Men, C.C.A., D.C., 105 F (2d) 62, recognizes that modernly recovery is allowable for mental injury which results in physical injury. The following quotations are in point:

> "The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress . . ."

> "But the law has long given redress, in some circumstances, for intended mental harm without more . . . ."

> "For a long time the assault cases stood practically alone; but in recent years an analogous principle has begun to develop. Several cases in which there was no physical harm and no assault have allowed recovery for intended mental harm which was serious enough so that it might have been found that defendant's acts had created a risk of physical illness . . . ."

> "In the present case the shock which defendant intentionally inflicted not only risked, but actually caused, physical harm. In such circumstances, recovery has repeatedly been allowed . . . ."

> "No one has a general license purposely to injure the bodies of others. That mental means are used can be no excuse . . . ."

It is noteworthy that the court in the above case relied in part upon *Gadbury v. Bleitz,* 133 Wash. 134, 233 Pac. 299. The law of Washington clearly allows recovery where the mental distress actually causes injury to plaintiff's physical well-being.

The Washington cases cited by appellant merely are not in point. *Barnes v. Bickle*, 111 Wash. 133, denies recovery for "mental and physical distress," the court saying in its opinion that "the gist of the complaint is for physical and mental distress." *Stiles v. Pantages Theater Company,* 152 Wash. 626, denies recovery to a girl excluded from a movie contest, saying that "mere mental suffering" and no physical injury was involved. *Lewis v. Physicians Credit Bureau,* 27 Wn. (2d) 267, concerns the right of privacy only. *Corcoran v. Postal Telegraph-Cable Company,* 80 Wash. 570, involves only mental suffering and no physical injury. None of these cases detracts from the rule of *Gadbury v. Bleitz,* 133 Wash. 134, which allows recovery where plaintiff suffers injury to her physical well-being. That is the rule applicable here where insanity resulted.

Furthermore, a recovery would be proper here under the law of Washington even if this plaintiff suffered only a mental injury, since the conduct of defendant's agent was willful and wanton. Recovery is permitted for mere mental distress if the invasion of plaintiff's rights is commited with an intention to cause mental distress or with such recklessness as to show an indifference to consequences. *Wright v. Beardsley,* 46 Wash. 16; *Gadbury v. Bleitz,* 133 Wash. 134; *Corcoran v. Postal Telegraph-Cable Company,* 80 Wash. 570; *Stiles v. Pantages Theater Company,* 152 Wash. 626. The evidence here indicated that Anderson was intentionally or wantonly causing emotional distress to appellee to induce her to give him information he sought, with a reckless indifference to consequences.

And in any event, the evidence here showed actual physical illness resulting directly from and at the time of the grilling conducted by defendant's agent. The law is clear from all the cases that recovery even for mental distress is allowable when accompanied by physical injury. Appellee had just recovered from a major stomach operation and the evidence showed that, in conjunction with the emotional upset, she suffered physical illness as a result of the grilling and had to take medicine while it was going on.

Appellee sustained further actual physical injury and suffering as a result of the emotional upset by her

refusal to eat immediately after the occurrence and the consequent starving of her body and nutritional deficiency for which the doctor treated her immediately. Many such manifestations of the psychosis caused real physical pain and suffering.

II. The finding of proximate cause is amply supported by the evidence.

In Specification of Error Number 3, appellant attacks the finding of the trial court that the injury proximately resulted from defendant's grilling. There is, of course, the obvious presumption in favor of the finding of fact of the trial court if there is any substantial evidence to support it.

Appellant argues both that defendant's agent could not reasonably have forseen the injury and that there was in fact no causal connection between the grilling and the mental collapse.

It must first be remembered that the conduct of defendant's agent toward appellee were intentional acts. He intended to conduct himself exactly as he did. We are not concerned with his negligent or careless inadvertent acts. He is presumed to intend the natural and probable consequences of his intentional acts. And if he intentionally causes emotional distress which he should recognize as likely to cause *any* illness or bodily harm, he is liable for *all* bodily harm which does result

in fact. Restatement of Torts, Negligence, Vol. II, Ch. 12, Sec. 312, p. 847.

There is ample evidence to support the finding of the trial court. Anderson knew of appellee's recent operation and that she was suffering distress; she was becoming upset and had to take medicine while he questioned her and yet he persisted. It is clear from the evidence that he was intending to upset her in the hope of getting information more readily. He was intentionally and wantonly disturbing her on delicately personal subjects concerning her marital affairs and her husband. He repeated questions excessively over an unreasonable length of time. It is this combination of factors which Dr. Riley testified was likely to cause such an injury as this.

Whether or not Anderson acted intentionally to cause harm, what were his motives and what he should reasonably have forseen, are questions for the trier of the facts. *National Life & Accident Ins. Co. v. Anderson,* 102 P (2d) 141.

The above case also holds that recovery is proper for mental or nervous shock where physical injury results.

There is ample evidence to support the finding that Anderson's conduct was in fact the cause of the injury. The unbroken chain of progression from the emotional

upset to the psychosis which is outlined in the Statement of the Case can leave little doubt as to the actual causation. The medical testimony was that such an event could very well cause the insanity and that some such emotional upset was necessary to cause it. The evidence showed no other factor which could have caused it.

The medical testimony as to causation which was upheld in *Emden v. Vitz,* 88 Cal. App. (2d) 313, 198 P (2d) 696, was much the same as we have here. The doctor there testified that the condition was caused by "some sort of upset or emotional experience." That court further pointed out that the injury was just as real whether caused by a blow or through some action on the mind.

III. This case is not within the exceptions of the Federal Tort Claims Act.

In Specification of Error No. 4, the appellant contends that Anderson's words and acts in relation to appellee were within the exceptions of the Act and that therefore there can be no recovery here, specifying the exceptions of assault, misrepresentation and deceit, or upon abuse of discretion on the part of a government agent.

Categorically, this case does not come within any of those exceptions to the Federal Tort Claims Act. As

earlier shown, the law is clear in the State of Washington that recovery may be had for an injury such as this even though no physical impact or actual assault was involved. Anderson knew appellee was already physically ill. She took medicine in his presence. He knew that she was becoming emotionally and mentally disturbed. These would have been caveat to a prudent man but Anderson persisted in his grilling. By his repetitive questions and insinuations, his true statements and some false ones, he tried to break her down. His every word was deliberately calculated to cause such emotional and mental stress that the cumulative effect would create such stress of mind and emotion that she would breach the trust she had in her husband and his work and betray them to the defendant. The evidence justifies the conclusion that Anderson intentionally and unreasonably persecuted the plaintiff to severe mental distress involving a risk of causing physical harm which did result in substantial measure. This was a willful legal wrong but by and large it is not the stuff of physical assault.

Nor can an action based on such conduct be said to rest on charges of misrepresentation or deceit. The gravamen of plaintiff's complaint was the above-mentioned conduct of Anderson and his acts calculated to cause the emotional upset which did occur.

In its argument that the Government shall not be

liable in cases where the cause of action is based upon the abuse of discretion on the part of the employee of the United States while exercising a discretionary function, defendant contends that Agent Anderson's duties vested in him a great amount of discretion in the course of his official duties. Reference is made to War Department Circular 276 as Exhibit A-5, beginning on page 102 of the Transcript of Record and to Exhibit A-7 printed on page 115 through 117 of the Transcript of Record. Conceding the contents thereof it is difficult to imagine a Government agent or employee the exercise of whose duties do not involve a degree of "discretion". All drivers of Government vehicles must exercise discretion of considerable degree and yet the reported cases are replete with instances of Governmental liability for their negligence or abuse of discretion.

In his oral opinion the trial judge clearly distinguished the present case from the type to which the "discretionary function" exemption applies. He said:

> "The principle, in my opinion, is like that which applies to the malpractice of a surgeon, who may in his honest discretion operate or not operate, but if he does so, he must apply to such operation that professional skill which is ordinarily applied by reasonably competent surgeons. For his failure to do so, he is liable to the patient for any proximately resulting injuries and damages.
>
> So here, even if Sergeant Anderson exercised discretion as to whether or not he should interrogate

> Mrs. Hambleton, he was, after deciding to do so, bound to apply reasonably prudent methods, use due and ordinary care, and to refrain from excessive grilling and any and all other emotionally distressing methods of interrogation likely to injure her body or mind or endanger her health, but Sergeant Anderson did not act within that principle. On the contrary, he grilled Mrs. Hambleton for an unreasonably long time and put to her excessively repetitive questions concerning delicate personal subjects connected with her husband's marital and personal misconduct not related to the person whom Sergeant Anderson was investigating."

Cerri v. United States, 80 F. Supp. 831, involves the case of a soldier acting under general orders and regulations to protect all government property in view and to arrest all persons causing disorders near his post of duty. He asked a motorist to move his vehicle. The motorist did so, returned to the soldier, struck him and then ran. The soldier shot his pistol at his fleeing assailant and in doing so injured an innocent bystander. Under the law of California, in which state the action arose, the shooting of a pistol at a mere misdemeanant constituted a use of greater force than was necessary or justifiable and hence was negligence towards the injured party. The court ruled, the fact that the soldier used greater force than was necessary and so became guilty of negligence did not place his act outside the scope of his employment. Clearly the case is in point in that it involved an abuse of discretion similar to that in the instant case.

Kendrick v. United States, 82 F. Supp. 430, presents the type of "discretionary function on the part of a federal agency" discussed under the provisions of Section 2680, Title 28, U.S.C., Subsection (a). In that case the manager of a Veterans Administration Facility discharged a war veteran from further hospitalization for his mental condition. It was there held that the manager of the hospital, and by the same token, the United States, could not be held liable for the death of one who was subsequently killed by the veteran on the grounds that the manager was negligent in releasing him. The Court said:

> "The performance by *executive officers* of *discretionary governmental duties intrusted to them by statute is not subject to judicial review.*" (Italics are ours).

Santana v. United States, 175 F. (2d) 320, was a case in which the federal district court had jurisdiction of an action under the Federal Tort Claims Act of the heirs of an honorably discharged member of the armed forces for his wrongful death allegedly caused by employees of the United States at a hospital to which the deceased had been admitted for treatment; in that said employees failed to take any reasonable measures to care for and/or treat the said patient.

It is obvious that the matter before the court now is in point with *Cerri v. United States,* supra, and *San-*

tana v. United States, supra. Clearly, both of those cases can be said to involve an abuse of discretion on the part of government agents and yet in both it was held that the actions were cognizable under the Federal Tort Claims Act. The abuse of discretion on the part of an employee of the government while exercising a discretionary function on the part of a federal agency mentioned in Section 2680, Title 28, U.S.C., Subsection (a) is the type of discretionary function discussed in *Kendrick v. United States,* supra, and is not at issue before the court at this time.

IV. The trial court did not commit reversible error in ruling that appellee did not have to disclose a certain name.

Appellant's Specification of Error No. 5 alleges error in refusing to compel appellee to disclose a certain name.

The testimony of appellee and the colloquy of judge and counsel on this point at pages 52 to 54 of the Transcript show that no error was committed. Appellee was testifying in response to questions by Government counsel. When asked who a certain phone call was from, appellee stated that she would rather not give the name and then proceeded to volunteer the hearsay testimony as to what the lady said. Government counsel did not try to stop the witness, did not object to the hearsay and did not move to strike the answer as hearsay or as not

responsive. Instead, counsel again persisted in asking the lady's name. The court rules that counsel did not have to indulge the hearsay and that he could not elect to let the hearsay stand for the purpose of building up a supposed need for the having the name disclosed.

The ruling of the trial court was obviously correct. If Government counsel had moved to strike the improper testimony it would have been granted. The court merely refused to let counsel use that improper testimony as a straw man to find an excuse to meet it. The only conceivable error could be a denial to Government counsel of a right to meet and cross-examine certain testimony. Appellant's brief says they were prepared to disprove the hearsay. When the court invited counsel to remove that very testimony from the case or to keep it out as not responsive to his own questions, counsel elected to indulge the hearsay. Counsel cannot complain that he was denied a right to meet that testimony which he could have removed completely.

It is clear from the trial judge's rulings that he was respecting appellee's wishes as to disclosing the name since there was no proper legal need for disclosing it. Government counsel has only created an artificial need. Accordingly, appellant's argument as to privilege is not in point. The legal question as to privilege only becomes pertinent if otherwise relevant and vital testimony is

excluded on that ground.

Furthermore, the question of admitting into evidence the name of a woman who allegedly made a hearsay statement on a collateral point brought out on cross-examination is not such a substantial point as would require reversal of a case tried to the court without a jury.

CONCLUSION

Appellee suffered a serious bodily injury in the form of a complete mental collapse requiring medical treatment and hospital care and causing great pain and suffering. That injury was caused by conduct of defendant's agent wherein he wilfully and wantonly caused her emotional distress which was likely to injure her body or mind or endanger her health. The insanity followed immediately and directly after the emotional upset with no intervening cause. The trial court properly so found on the basis of substantial evidence. The tort committed is not covered by any of the exceptions in the Tort Claims Act and recovery for the injury was properly allowed under the laws of the State of Washington. The judgment should be affirmed.

Respectfully submitted,

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George R. West
Attorneys for Appellees.